United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

To Be Argued by WILLIAM SONENSHINE, ESQ.,

76-1217

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-1217

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

VICTOR IADAROLA, GRACE HELEN IADAROLA
and BENITO IADAROLA,

Defendant-Appellants.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF IN BEHALF OF APPELLANTS
VICTOR IADAROLA, GRACE HELEN
IADAROLA and BENITO IADAROLA

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BENNETT M. EPSTEIN, ESQ. and
WILLIAM SONENSHINE, ESQ.
Of Counsel

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BRIEF IN BEHALF OF APPELLANTS VICTOR IADAROLA, GRACE HELEN IADAROLA and BENITO IADAROLA

PRELIMINARY STATEMENT

Appellants Victor Iadarola, Grace Helen Iadarola and Benito Iadarola appeal from judgments of conviction, filed May 7, 1976 in the United States District Court for the Southern District of New York after a trial before Hon. Henry F. Werker, United States District Judge, and a jury.

Indictment number 75 Cr. 365, filed April 11, 1975, charged appellants herein and another defendant, Lewis Markus, with conspiracy to deal in counterfeit United States Treasury Bills (18 U.S.C. 371) (Count One), passing and selling counterfeit United States Treasury Bills (18 U.S.C. 472) (Count Two), and dealing in counterfeit United States Treasury Bills (18 U.S.C. 473 (Count Three).

A motion to suppress physical evidence, namely, the Treasury Bills in question and other items, was denied after a hearing before Judge Werker on February 19, 1976.

On February 19, 1976, the defendant Markus entered pleas of guilty to Counts One and Three of Indictment number 75 Cr. 365 as well as Counts One through Four of Indictment number 76 Cr. 73.

The trial of appellants Victor Iadarola, Grace Helen Iadarola and Benito Iadarola began March 11, 1976 and was concluded March 19,1976 with the conviction of each of the defendants on all three counts of the indictment.

On May 7, 1976 each of the defendants was sentenced to concurrent terms of imprisonment of five years on each count, execution of which was suspended and the defendants placed on probation for a period of five years, and a fine of $1,000.00.

Appellants Victor Iadarola, Grace Helen Iadarola and Benito Iadarola have each filed a timely Notice of Appeal.

THE TRIAL

The Government's Opening Statement

The following is the statement of the Government's case in its opening. The complete opening is reproduced at pages A1* to A5 of Appellants' Appendix.

> "MR. LEVITT: The government's proof will show that these three defendants, Victor, Grace and Benito Iadarola had access to counterfeit $100 thousand Treasury Bills and that a co-conspirator of their's, an individual by the name of Lew Marcus, who used the name Lewis Rubin, thought he had found a buyer for these counterfeits. The defendants attempted to sell these bills to their buyer at the Waldorf Astoria Hotel on March 31, 1975. They failed, but not because of anything they did. They failed because the person Marcus contacted concerning these bills was an informant for the government, a convicted felon who was cooperating and supplying information to the government, and that informant told the Secret Service and the person who the informant introduced as a buyer for these counterfeits was a Secret Service agent acting undercover and the meetings were carefully watched by the Secret Service on March 31 and they never sold the bills, and they are present here today.
>
> "In proving its case, the government will put before you to testify, the informant, Chester Gray. You will also hear the testimony of the undercover agent, a fellow by the name of Paul Sweeney, as well as various agents who surveilled the meetings on March 31, 1975, and you will learn the results of those meetings. You will hear

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* References prefixed with the letter "A" refer to pagination in appellants' Appendix. Unprefixed references are to pages as originally numbered in the stenographic transcript of proceedings

from an expert who will testify to you and explain to you how these bills were made and the counterfeit nature of these bills.

"This shall be the government's proof during the trial" (A3-4)

The Government's Evidence

On March 22, 1975, Chester Gray, a professional informant with a multiplicity of arrests and convictions* who was to receive $1,500 for his participation in the instant case, apprised agents of the Secret Service that someone he knew as Lewis Rubin had that same day offered him the opportunity to dispose of several million dollars worth of stolen United States government securities if he could come up with $100,000 in cash for participation in the first two million dollars worth (A7,A7a).

That evening, Agent D. Paul Sweeney of the Secret Service met Gray at a Manhattan restaurant, where he instructed him to telephone Rubin and tell him he had found someone with the $100,000 to begin the transaction. Gray did so and Rubin told him he would have the securities delivered to them the the following day at 1:00 p.m. at the Peacock Alley, a restaurant in the Waldorf Astoria Hotel. The next morning, Gray called Rubin

* That portion of the transcript dealing with Gray's criminal background is too voluminous to reproduce in appellants' Appendix. In a nutshell, Gray admitted to having been arrestd more than twenty times in such places as New York, Miami, Havana, Chicago, Texas and Los Angeles and to having been convicted on at least half that number of occasions for such crimes as fraud, larceny and possession and transportation of stolen securities. (Gray, 1-5; 31-63).

to confirm the meeting but it was postponed until the following Monday, March 31st, at the same time and place (A8-10).

On March 31st, Gray and Sweeney were sitting at a table at the Peacock Alley when Rubin arrived at approximately 2:00 p.m. and approached them. After a few minutes of small talk, Rubin spotted an unidentified gray-haired man approximately 50 years of age, wearing a camel's hair coat, walking through the lobby. He excused himself to speak to this man and disappeared into the lobby with him. (A11).

When Rubin returned to their table about five minutes later, he was alone. He asked them if their money was at the hotel. Upon being informed that they had $50,000 in cash, he stated that he would call "his people" and tell them to bring the securities. He thereupon left the table and disappeared into the lobby. (A12).

Rubin returned to the table several minutes later and informed Gray and Sweeney that his people had instructed him to see the money for himself. Rubin and Sweeney then proceeded to the safe deposit area ofthe Waldorf Towers where Sweeney showed Rubin $50,000 in government funds which he had placed in one of the safe deposit boxes. Rubin thumbed through the money and said that he could now call his people and tell them that he had actualy seen it. They went back to the Peacock Alley and rejoined Gray at the table. (A13-15).

Rubin asked Sweeney for his room number and instructed him to wait there until contacted. He then went and registered at the hotel, after which he and Gray went to have lunch. (A16).

After lunch, Gray went up to Sweeney's room and gave him Rubin's room number, which was 810. Sweeney was in room 35A-3 of the Waldorf Towers. Next door, in 35A-4, was a team comprised of other Secret Service agents and New York City detectives. (A16-17).

After Gray had arrived at Sweeney's room, Rubin telephoned and asked Gray to come down to see him at his room. Sweeney told Gray to try and prod Rubin to call his people to find out what the delay was, and, in so doing, to learn as much about them as he could. (A17-18).

Gray asked Rubin, "[H]ow quickly before the securities get to the hotel." Rubin said, "Just a moment, let me make a telephone call." Rubin then dialed the phone. Gray could not hear the party on the other end of the phone, but he heard Rubin ask for "Grace", then ask for "Benny" and then ask for "Victor", after which he listened and he hung up and then he said to Gray, "The bonds will be here shortly." Gray then left and rejoined Sweeney in room 35A-3. (A19-20).*

Thereafter, Rubin telephoned Sweeney's room and informed Gray that he would be right up. When Rubin arrived at the room he apologized and said there had been a slight change in plans. His people had only delivered two "pieces" and they wanted $20,000 for them. The additional eight pieces, making up the first million would be delivered by noontime the

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* Agent Sweeney was permitted, over objection, to relate what Gray had attributed to Rubin upon Gray's return to Sweeney's room. According to this double-hearsay version, Rubin, after saying "[T]he bonds will be here shortly", added the sentence, "Grace is in motion." (A21).

following day and the second million would be available the day after that. He said his people were down in his room and those were the instructions they had given him. (A20,22-23).

Sweeney asked Rubin to show him a sample. Rubin took a counterfeit $100,000 Treasury Bill from his pocket and showed it to Sweeney. Sweeney asked to see the second bill, but Rubin said that he didn't have it because his people were holding it down in his room and that they would only permit them to be seen one at a time. (A-24).

Sweeney told Rubin he would have to call his own people to see what to do in view of this change in plans, and asked Rubin to leave the room while he did so. Sweeney then called Agent James Heavey in the room next door and the decision was made to arrest Rubin immediately and then go down to his room. (A24-27).

Rubin was thereupon invited back into the room, handed back the Treasury Bill and told to return with the second bill. As he left the room, he was immediately arrested and searched by the agents waiting in the next room. They recovered the Treasury Bill and the key to room 810 and a group of them proceeded directly downstairs to that room. (A28-29; Gov't. Exhs. 3,12).

The agents opened the door to room 810 using the key they had seized from Rubin and entered with their guns drawn. They observed the defendant Grace Iadarola reclining on the bed and the defendants Victor and Benito Iadarola seated in two chairs at the foot of the bed. (A30,A30a).

Victor and Benito were taken from their chairs into the bathroom and strip searched. The agents directed Grace to leave the bed and she seated herself on top of the dresser opposite the left side of the bed. (A31-32).

While the search was progressing, all three defendants were advised of their rights by agent Heavy and interviewed separately. Benito Iadarola said he was in the room waiting to collect some money that was owed to his wife. Grace Iadarola stated that she was there to collect money that was owed her. Victor Iadarola said he was just accompanying his brother and sister-in-law. All three stated that they did not know who was registered in the room, knew nothing about a counterfeit Treasury Bill and did not know a Lewis Rubin or Lewis Markus, which was Rubin's real name. (A33-37)*.

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* Whether or not the defendants were in fact asked about the name Markus in addition to the name Rubin was left open to much doubt. Agent Heavey made no notes of his interview with the defendants. Heavey's testimony about the statement at a pretrial suppression hearing made mention of the name Rubin only and contained no mention of the Markus name. Nor was there any mention of the name Markus in the pertinent portion of the agent's report, which was signed by Agent John Vezeris but based upon information supplied by Heavey. Agent Vezeris also testified that he had no recollection that the Markus name was mentioned to the defendants. There was no evidence that the agents knew that Rubin's true name was Markus at the time they interviewed the defendants in the hotel room. (A38-42).

While the defendants were being interviewed, other agents were searching the room. When they reached the dresser they asked Grace Iadarola to move and she complied. In the top right hand drawer of the dresser they found another counterfeit $100,000 Treasury Bill. (A43-44; Gov't. Exh. 6).

The agents also found an attache case on the floor at the foot of the bed and searched it. In it they found documents indicating that the briefcase belonged to a Lewis Rubin. They also found something in the briefcase with the name of Lewis Markus on it, and a slip of paper which contained the name "Grace H. Iadarola", an address, various telephone numbers, the name "Victor Iadarola" and the address "Brooklyn, New York". (A45-46; Gov't. Exh. 8).

On the person of Victor Iadarola they found a slip of paper bearing the name "Lewis Rubin" and a blank check drawn and endorsed by Lewis Markus. (A47-48; Gov't. Exhs. 4,5).

The Iadarolas were taken to the 54th Street Police Precinct and then to the New York field office of the Secret Service. Rubin was also taken to the same place and during this time he came in contact with the Iadarolas. The next day, April 1, 1975, Grace Iadarola was once again interviewed at the field office. She now stated that she did in fact know the person known as Markus/Rubin, that she had loaned him money and that he had owed her money for a business transaction. She further stated that she had three children and was pregnant with a fourth and had never been convicted of a crime. She said that on March 31 she had received a call from Rubin that he had some money for her; that in view of her pregnancy, she

was accompanied by her husband and brother-in-law to the Waldorf to collect it. She again denied any knowledge of the counterfeit Treasury Bills. (A47, A49-52).

The Court's Ruling on Defendants' Motion to Dismiss

The entire text of the Court's ruling on defendants' motions made at the end of the Government's case and renewed at the end of the entire case is reproduced at pages A53 to A57 of Appellants' Appendix.

POINT ONE

THE GOVERNMENT'S OPENING FAILED TO STATE SUFFICIENT EVIDENCE TO SUPPORT CONVICTION; THE COURT SHOULD HAVE GRANTED DEFENDANTS' MOTIONS TO DISMISS

The Government's opening statement to the jury is reproduced in its entirety at pages A1-5 of Appellants' Appendix, and that portion of it dealing with what the Government would prove at trial is quoted at pp. 3-4, supra. After the Government's opening, all three defendants moved unsuccessfully to dismiss the indictment upon the grounds the Government failed to state a prima facie case.

The motions should have been granted. An opening statement should state "sufficient evidence before the jury to support the conviction." United States v. Greenberg, 268 F 2d 120, 123 (2d Cir. 1959). While we concede that the granting of a motion pursuant to F.R.Cr.P. Rule 29(a) after the Government's opening is discretionary, such relief is available and should be granted when the opening contains no indication of how the

Government intends to prove the key elements of the crime. See, United States v. Capocci, 433 F 2d 155, 158 (1st Cir. 1970).

In the instant case, the Government's opening contained only the vaguest of statements that defendants "had access to" and "attempted to sell" counterfeit Treasury Bills on the date in question at the Waldorf Astoria Hotel. Reading the indictment would have been a more informative and more sufficient opening. As we demonstrate in the points which follow herein, the evidence was insufficient in terms of the proof required to establish a conspiracy for evidentiary purposes and the proof necessary to let the case go to the jury. The Government's opening was a clear, strong symptom of the disease of legal insufficiency which, we submit, should have been diagnosed then and there by the trial judge.

POINT TWO

THE COURT ERRED IN ADMITTING THE HEARSAY STATEMENTS OF THE ALLEGED CO-CONSPIRATOR; THERE WAS INSUFFICIENT "INDEPENDENT EVIDENCE" OF ANY DEFENDANT'S PARTICIPATION IN A CONSPIRACY

Throughout the trial the Court admitted, "subject to connection", statements which Rubin, the alleged co-conspirator, made to the informant Gray and Agent Sweeney. This evidence was the subject of continuing objections by each of the defendants and was the main thrust of the motions to acquit at the close of the Government's case and at the end of the entire case (Gray, 7-12; Sweeney, 182; Proceedings 768-798, 807). The Court's ruling on the admissibility of these

statements is reproduced at pages A53 to A57 of Appellants' Appendix.

We note at the outset the venerable principle that statements allegedly made during the course of and in furtherance of an alleged conspiracy,

> "are admissible over the objection of an alleged co-conspirator, who was not present when they were made, only if there is proof aliunde that he is connected with the conspiracy...otherwise hearsay would lift itself up by its own bootstrap to the level of competent evidence."

Glasser v. United States, 315 U.S. 60, 74-75 (1942).

In United States v. Nixon, 418 U.S. 683 (1974), the Supreme Court reaffirmed this rule, stating, with regard to the quantum of independent proof necessary, that "as a preliminary matter, there must be substantial independent evidence of the conspiracy, at least enough to take the question to the jury" (418 U.S. 683, 701 n.14).

Prior to Nixon, supra, this Court held in United States v. Geaney, 417 F 2d 1116 (2d Cir. 1969), cert. denied sub. nom. Lynch v. United States, 397 U.S. 1028, that the trial judge must determine whether the defendant's participation in a conspiracy has been established by "a fair preponderance" of the independent, non-hearsay evidence before hearsay statements made by an alleged co-conspirator may properly be considered against the defendant. Subsequent to Nixon, this Court has adhered to the "fair preponderance" test, rejecting the footnote in Nixon as dictum. United States v. Wiley, 519 F 2d 1348, 1351 (2d Cir. 1975).

Regardless of what standard of proof is observed here, the non-hearsay evidence was clearly insufficient to establish that any one of the three defendants was a member of a conspiracy.

As the trial judge himself made perfectly clear (A54), crucial to his finding of sufficient independent non-hearsay evidence was his determination that the transaction between Gray and Rubin encompassing Rubin's telephone call from room 810 in which he asked for "Grace", then "Benny" and then "Victor", including conversation between Gray and Rubin before and after the call, was a non-hearsay "verbal act". (A19-20; A54-55).

While it is conceded that the asking for a party on the telephone may be admissible as a "verbal act" to prove that the call was made, that is the extent of the verbal act doctrine. The Court erred when it considered the substance of the call together with the surrounding conversation as proof of the truth of the matters stated therein; i.e., that "Grace", "Benny" and "Victor" were involved in the crime.

An extrajudicial statement offered to prove the truth of the fact asserted in it is, by definition, hearsay. Fed. Rules Evid. Rule 801(c); 6 Wigmore, Evidence 1766 at pp. 177-178 (3rd ed. 1940). The verbal act doctrine holds that the verbal parts of certain acts offered for reasons not entailing their truth may for that reason be admitted merely to show that the utterance was made. 6 Wigmore, Evidence 1772; see, Anderson v. United States, 417 U.S. 211, 220 (1974).

Professor Wigmore states the rationale behind the doctrine as follows (at p.191):

> "Thus the words are used in no sense testimonially, i.e., as assertions to evidence the truth of the fact asserted in them. On the one hand, therefore, the Hearsay Rule interposes no objection to the use of such utterances, because they are not offered as assertions (Ante 1766). On the other hand, so far as they may contain assertions, these are not to be used or argued about testimonially, nor believed by the jury; for this would be to use them in violation of the Hearsay Rule." (Emphasis added).

United States v. Nuccio, 373 F 2d 168 (2d Cir. 1967), the case relied upon by the trial judge herein for his finding of a verbal act (A55), bears no similarity to the instant case. In Nuccio, an instruction by one co-conspirator to another to visit the Boroughs of Brooklyn and Queens was held to be a verbal act. Such oral instructions by one person to another, of course, are classic verbal acts, admissible as proof of the fact they were made, as was clearly the case in Nuccio. (373 F2d at p.170).

Even should the Court decide that our reasoning thus far is incorrect regarding the hearsay nature of the testimony in question, that would still not make it admissible to prove the conspiracy. For the principle, as enunciated by the Supreme Court in Glasser, supra, and by this Court in Geaney, supra, and its progeny, is one of requiring not merely non-hearsay evidence but evidence aliunde - from another source - which is not dependent for its true significance upon the silent thoughts

of an absent declarant. Perhaps a better statement of the rule for present purposes was that of this Court in United States v. Baker, 419 F 2d 83 (2d Cir. 1969) at p.88:

> "We have held that in a conspiracy case the Court must make a preliminary determination whether, if the testimony of the Government witnesses is accepted as true, each defendant's own acts and statements show a connection with the conspiracy sufficient to justify the admission of the acts and statements of co-conspirators against him [citations omitted]".

Even should this Court decide that the trial judge properly considered the transation involving Rubin's phone call, we would submit that it should have been afforded little weight. There was no conversation on the telephone other than the mere inquiry, by Rubin, as to whether a series of names were available on the other end. His mere asking for three names on the telephone fails to indicate that any one of those individuals was a knowing participant in a scheme to possess and sell counterfeit securities.

That is not to say that the trial judge did not seem to think so, for it was on this basis alone that he sent the case of Benito Iadarola to the jury. Said the judge:

> "Again, the real turning point in my decision to give this to the jury was the fact that there was a telephone call. Benny said he did not know Rubin in the hotel, fine, but when the conversation was had by Rubin calling Grace, Victor or Benny, there must have been some reason in his mind for asking for Benny.

This is for the jury to determine, whether there was or was not a nexus there." (A58).

All we can say with regard to the trial judge's theory of the significance of Rubin's having asked for "Grace", then "Benny" and then "Victor" is that his imputation of Rubin's state of mind to anyone he asked for on the telephone was clearly and fundamentally wrong as a matter of law.

Besides the telephone call and the defendants' mere presence in the room, only other "bits and pieces" of independent evidence found by the Court were the fact that Grace Iadarola seated herself on the dresser where the bond was eventually found and the fact that Victor Iadarola denied knowing Lewis Rubin or Lewis Markus. This the Court found to be a false exculpatory statement as to Victor in view of the fact that one of those names was present on a slip of paper and the other on a check found in Victor's wallet. (A55-56; Gov't. Exh. 4,5).

It seems clear that the trial judge himself attached little significance to these other facts in view of his characterization of the telephone call discussed heretofore as "crucial" and "the turning point" as far as the Court was concerned. Indeed, these other facts were hardly worthy of mention except for the purpose of attempting to bolster the Court's decision to deny the motions based upon the telephone call.

The testimony revealed that Grace Iadarola sat on the dresser after she was directed to leave the bed by one of

the agents, during a time when seven or eight agents were present in the room and while the room was being thoroughly searched. The agents had just burst into the room at gunpoint, announced the arrest, and pulled her husband and brother-in-law from the two chairs at the foot of the bed and began to strip-search them. Pictures of the room in evidence (Defts. Exhs. B1-5) reveal that the dresser in question was opposite the left side of the bed about two or three feet from the bed. Under these circumstances, to say that her sitting on the dresser evinced consciousness of guilt borders on the absurd. Someone in her position had to assume the agents would eventually order her off the dresser and search it, just as they had done when she was on the bed. In fact, this is exactly what happened, and she left the dresser without a fuss. (A32). Psychologically speaking, her presence on the dresser was more probably due to a desire to avoid getting in the way of the agents and their activities or to seek a place where her back would not be turned and she could observe what was going on that represented, as with any frightened creature, the "high ground".

With regard to the so-called false exculpatory statement by Victor, it is apparent that the trial judge himself attached little importance to it. The following occurred during the Government's oral argument on the motions (at p.794):

> "THE COURT: The question is what does [the statement] show knowledge of?
> "MR. LEVITT: It shows that the defendant knew Lewis Marcus-Rubin.
> "THE COURT: But that is a long way from a conspiracy, isn't it, if he knew Lewis Rubin, Lewis Marcus, whatever? What else does it show. That is what I am getting at. You know, this isn't like

all of those narcotics cases that you cited to me where you have surveillance, you have some relationship, a patting-down by the fellow who says: No, I'm not involved in the conspiracy. But he attends at the passing of one thing or another, money or dope."

Indeed, any significance to be found in Victor's statement is the result of two weak inferences piled one upon the other. The first is that Victor's denial that he knew Markus/Rubin was false merely because he had the two names in his pocket. The second is that the denial evinces a conciousness of guilt. Courts have long recognized the fallibility of such evidence. A propos is the following quotation from People v. Leyra, 1 NY 2d 199 (1956), the leading New York State case on the subject:

> "Naturally enough, the courts have consistently acknowledged the weakness of this type of evidence, reflecting a consciousness of guilt, where it is not supported by other proof of a truly substantial character. In an early case, Chief Justice Shaw of the high court of Massachusetts, after remarking that falsehood and suppression of evidence 'tend somewhat to prove consciousness of guilt, and, when proved, to exert an influence against the accused', went on to express his distrust of such evidence in a statement which has gained almost universal approval (Commonwealth v. Webster, 5 Cush. 295, 316-317):
>
> " 'But this consideration is not to be pressed to urgently; because an innocent man, when placed by circumstances in a condition of suspicion and danger, may resort to deception in hope of avoiding the force of such proofs.'

"The courts of this state, approving and amplifying that pronouncement, have recognized that the inference of consciousness of guilt, though " 'one of the simplest in human experience,' may easily be pushed too far." (People v. Nowakowski, supra, 221 App.Div. 521,523; see People v. May, supra, 290 N.Y. 369, 373; People v. Reddy, 261 N.Y. 479,486; see also, Hickory v. United States, 160 U.S. 408, 417; 2 Wigmore, op.cit., 278, p.121) And our court has held that evidence of fabrication or other evasive conduct may 'not serve as a substitute for other proof' (People v. Giordano, supra, 213, N.Y. 575,583), that " 'it operates ordinarily only by way of lending strength to other and more tangible evidence.' (People v. Nowakowski, 221 App. Div. 521,523; and see Commonwealth v. Webster, 5 Cush. 295,317)". (People v. May, supra, 290 N.Y. 369, 373)". (1 N.Y. 2d 199,209-210 [emphasis in original]).

The principles enunciated in Leyra, supra, were clearly the rationale of the decision in United States v. McConney, 329 F. 2d 467 (2d Cir. 1964), where this Court reversed a conviction which relied too heavily upon such circumstantial proof. Held the Court (at p.470):

"It would place too much weight on defendant's extra-judicial exculpatory statement to authorize a conviction based almost solely on the fact that part of the statement not involving the corpus delicti of the crime, was shown to be false. The other evidence of guilt was extremely weak, and we do not think the statment was sufficient independent proof to justify denial of the motion for acquittal."

We would submit that the evidence against Victor, aside from this statement, was not only extremely weak, it was non-existent.

To summarize, then, the trial Court found that the only evidence linking Benito Iadarola to a conspiracy was Rubin's telephone call. The only independent evidence that the Court found as to Grace Iadarola was the telephone call and her sitting on the dresser. The Court specifically declined to find that she had made a false exculpatory statement. The only independent evidence that the Court found connecting Victor Iadarola to a conspiracy was the telephone call and the false exculpatory statement.

We respectfully submit that none of these factors show that any one of the three defendants had the requisite knowledge or intent to be a conspirator or to have committed any of the crimes charged.

POINT THREE

THE EVIDENCE WAS INSUFFICIENT TO PROVE THE DEFENDANTS' GUILT BEYOND A REASONABLE DOUBT

In United States v. Geaney, supra, discussed in Point Two, this Court held that the quantum of proof of participation in a conspiracy required for the trial judge to admit co-conspirator statements was lower than the quantum of proof required to send the case to the jury.

Should this Court determine that the trial Court properly

admitted the hearsay, we would contend that, hearsay and all, the Government's proof failed to meet the higher standard. In the interest of brevity we would reiterate our arguments heretofore made concerning the paucity of evidence of the key elements of knowledge and intent, and note that the addition of statements by Rubin that his "people" were bringing and had brought the securities fails to demonstrate these elements on the part of any individual defendant.[1]

In the instant case, there was no proof that any of the appellants ever physically possessed the Treasury Bills found on the person of Rubin or in the dresser drawer of Rubin's hotel room. The fingerprint evidence was negative. All that remains is the fact of the defendants' presence in the same room where a single document was found.

Bare presence, this Court has repeatedly held, "tells us nothing about what the defendant's specific function was and carries no legitimate, rational or reasonable inference that he was engaged in one of the specialized functions connected with possession." United States v. Kearse, 444 F.2d 62, 64 (2d Cir. 1971).

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1. The only time Rubin purportedly mentioned the name of an individual as taking some part in the scheme was in Agent Sweeney's double hearsay account of the now-famous telephone call from Room 810. According to Sweeney, the informant Gray told him that Rubin put down the telephone and said: "The bonds will be here shortly. Grace is in motion." (A21). Gray did not mention the latter sentence in his own testimony (A19-20). We contend in Point Four, infra, that the admission of such hearsay was prejudicial error.

In the foregoing connection, we would feel remiss if we did not quote for this Court several brief passages from the record which, we feel speak volumes about the nature and quality of the proof in this case.

The following is from the cross-examination of Agent Vezeris, who entered Room 810 and arrested the defendants:

"Q I think you told Mr. Abrams that no matter who sould have been in that room they would have been placed under arrest; is that right?

"A That is correct, sir.

"Q You didn't take the trouble, first, to find out who was in the room and what their implication or culpability might or might not have been in connection with this case. First you locked them up and then you asked; is that right?

"A That is correct, sir.

"Q Why, if President Ford had been in that room he would have been arrested too, wouldn't he? Anybody.

"A Anybody in that room would have been placed under arrest." (Vezeris, 697).

The following is the statement by the attorney for the Government in response to the defendant Benito Iadarola's motion at the end of the Government's case:

" As to Benito Iadarola, the government admits it has the weakest proof as to guilty knowledge, but the one thing we do have as to Benito is that when Mr. Rubin made that phone call he didn't only ask for Victor, he didn't only ask for Grace, he asked for Benny. He knew a Benny. And when the arresting agents came to room 810, there was a Benny, Benito Iadarola." (Proceedings, 782).

We would also be remiss if we did not point out the apparent reluctance with which the trial judge permitted the case to go to the jury, stating at one point (A57):

> "...I am restricted to a rule in this Court which says that when the facts lend themselves to two inferences, the one which is most unfavorable to the defendant should be adopted rather than, as in the State Courts, where the one most favorable to the defendant should be adopted."

The Court also told the attorney for the Government at another point:

> "The only reason this case is going to the jury is because I have an ingrown principle that basically the jury should determine credibility of witnesses, and that is the only reason it is going to the jury... If I were to determine the credibility of the witnesses in this case, we wouldn't be here this morning."

(Proceedings, 812).

POINT FOUR

AN ACCUMULATION OF ERRORS BY THE PROSECUTOR AND THE COURT DENIED DEFENDANTS A FAIR TRIAL

If we have accomplished nothing else by this point we feel safe in assuming that we have at least demonstrated that the case at bar was a very close factual issue. What follows, then, is a listing of some of the events at the trial which, we submit, constituted prosecutorial or judicial error. Given the closeness of this case, these items take on a greater

prejudicial impact, especially in their totality, than they might otherwise assume ordinarily.

A. The Court Erred in Admitting Agent Sweeney's Double Hearsay Version of Rubin's Telephone Call.

It may be recalled that Agent Sweeney was permitted to testify, over timely objection, to a conversation he had with the informant Gray in which Gray related the substance of Rubin's telephone call and surrounding utterances. According to Sweeney's double hearsay version, but not according to Gray's own testimony, Rubin said, after he put down the phone, "Grace is in motion." (A19-21).

We know of no exception befitting such rank hearsay. This was the only time that Rubin had allegedly singled out one of the Cadarolas by name. The prosecutor mentioned this testimony in his summation. (Proceedings, 829). Its prejudice, we submit, is manifest.

B. The Prosecutor Repeatedly and Purposefully Offered Inadmissible Documents into Evidence.

During the time the defense counsel was cross-examining Agents Sweeney and Vezeris with regard to prior inconsistencies in testimony and reports, the attorney for the Government, on at least four different occasions during this rather short trial, stood up in front of the jury and offered the entire document into evidence. (Sweeney, 325, 342-343, 384; Vezeris, 763). This was a tactic obviously designed to convey the impression to the jury that these documents contained material favorable to his cause that he could not put into evidence.

C. The Court Erred in Submitting the Issue of False Exculpatory Statements to the Jury.

At the end of the Government's case the Court found, as a matter of law, that neither the defendant Benito Iadarola nor the defendant Grace Iadarola had made a false exculpatory statement (A55-56).

Nevertheless, the Court charged the jury as follows:

> "There has been testimony that the defendants made statements tending to show their innocence at the time of their arrest. There has also been testimony that these statements were false.
>
> "I charge you that an exculpatory statement (statement tending to show innocence), when shown to be false, is circumstantial evidence of guilty consciousness and has independent probative force."

(Proceedings, 918-919).

This portion of the Court's charge was duly excepted to by counsel for defendant Grace Iadarola. (id. 922).

It is submitted that the Court, having previously determined that the evidence was insufficient as a matter of law to establish a false exculpatory statement by two of the defendants, erred when it submitted this issue to the jury as to all three defendants. The Court's charge also failed to indicate that each defendant had to be treated individually with respect to such evidence, thereby permitting the jury to apply the force of a false exculpatory statement by one defendant as against all. This was clearly prejudicial to the defendants Grace and Benito Iadarola.

POINT FIVE

THE WARRANTLESS SEARCH OF THE HOTEL ROOM EXCEEDED THE BOUNDS OF A SEARCH INCIDENT TO ARREST; THE TREASURY BILL SEIZED FROM A DRAWER FIFTEEN MINUTES AFTER THE ARREST SHOULD HAVE BEEN SUPPRESSED.

The evidence at the pretrial suppression hearing revealed that the Secret Service Agents entered Room 810, arrested the defendants, secured them, and began a full-blown, warrantless search of the room. The second Treasury Bill, which was received in evidence at the trial as Government Exhibit 6, was found some fifteen minutes later in the dresser drawer. (A59-62).

We would urge that such a search exceeded the lawful bounds of a search incident to arrest, and was therefore illegal under Coolidge v. New Hampshire, 403 U.S. 443 (1971) and Chimel v. California, 395 U.S. 752 (1969).

It should also be noted that there can be no questioning of appellants' standing to suppress the fruits of this warrantless search, which they are charged with possessing. Simmons v. United States, 390 U.S. 377 (1968); Jones v. United States, 362 U.S. 257 (1960).

CONCLUSION

APPELLANTS' CONVICTIONS SHOULD BE REVERSED AND THE INDICTMENT DISMISSED.

Respectfully submitted,

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